SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~350~~ 25

25

ELMER W. HENDERSON,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

STATEMENT AS TO JURISDICTION

B. V. LAWSON,
Counsel for Appellant.
LAWSON, MCKENZIE & WINDSOR,
JOSIAH F. HENRY,
Of Counsel.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 3829

ELMER W. HENDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION

Defendants,

SOUTHERN RAILWAY COMPANY,

Intervenor.

STATEMENT AS TO JURISDICTION UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

Elmer W. Henderson, plaintiff in the above entitled cause, respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provision

The statutory provision believed to sustain the jurisdiction is U. S. C. Title 28, Section 1253 (Act of June 25, 1948, C. 646, 62 Stat. —).

B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which Is Involved

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on October 28, 1948. The petition for appeal was presented and allowed on November 17, 1948, together with the assignment of errors.

D. Nature of the Case and the Rulings Below

This is an appeal from the decree of the United States District Court for the District of Maryland, entered October 28, 1948, dismissing the complaint. The suit was brought to enjoin, set aside and suspend an order of the Interstate Commerce Commission entered September 5, 1947, dismissing the complaint in the proceedings known as *Henderson* v. *Southern Railway.*

These proceedings had their origin in a complaint filed before the Interstate Commerce Commission on October 10, 1942, known as *Henderson* v. *Southern Railway,* in which it was alleged that the Southern Railway, intervener, violated the provisions of 49 U. S. C. 1(4) and 49 U. S. C. 3(1) in refusing to serve the plaintiff at tables allegedly reserved for Negroes where there were vacant seats, although providing service there for white passengers, and in the use of

a curtain around the tables allegedly reserved for Negro passengers. The complaint prayed that the railroad be ordered to desist from the alleged unlawful acts, that it be required to discontinue the practice of using curtains around the tables reserved for Negroes, and for damages. The Commission issued its report, finding plaintiff had been subjected to undue and unreasonable prejudice and disadvantage, that there was no necessity for an order for the future, and by its order of May 13, 1944 dismissed the complaint. (258 I. C. C. 413.)

An appeal was taken to the District Court of the United States for the District of Maryland to set aside the Commission's action. The Court held that racial segregation of interstate passengers is not *per se* forbidden by the Constitution, the Interstate Commerce Act, nor any other Act of Congress and has been approved by the Supreme Court; that the railroad's dining car regulation did not provide substantial equality of treatment; and by its decree of February 15, 1946 remanded the case to the Commission for further proceedings in light of the principles outlined in its opinion. (*Henderson* v. *U. S.*, 63 F. Supp. 906.)

After further hearing before the Commission at which was presented the railroad's amended dining car regulation providing for the absolute reservation of one table for Negro passengers next to the kitchen, opposite the steward's office, and separated from the remainder of the dining car by a 5 foot wooden partition, the Commission found that the new regulation is not violative of any provision of the Interstate Commerce Act; that an order for the future is not necessary; and by its order of September 5, 1947 dismissed the complaint.

An appeal from this order was taken to the District Court of the United States for the District of Maryland which held, in its opinion of September 26, 1948 (*Henderson* v.

U. S., —, F. Supp. —), that the amended dining car regulation removed the inequality found to exist prior thereto; that the present provision for dining car service does not permit an unjust discrimination against Negro passengers; that there is a very definite distinction between segregation in interstate buses and interstate dining car accommodations; that racial segregation of interstate passengers is not forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, provided there is no real inequality of treatment of passengers; that allotment of seats by race of passengers, if equality of service is proportionately fair, is not *per se* real inequality; and that refusal to seat and serve a passenger at any vacant seat in the dining car, when the table or tables provided for persons of his race are occupied, is no more unjust or inequitable than the wait necessary for all passengers when all seats in the dining car are occupied. By its decree of October 28, 1948 the complaint was dismissed.

The questions presented by this appeal are substantial ones. In 1896 the Supreme Court, in *Plessy* v. *Ferguson*, 163 U. S. 537, held that a state law requiring segregation by race of intrastate passengers was not an abridgement of a colored passenger's privileges and immunities, a deprival of property (the reputation of belonging to the dominant race) without due process of law, nor a denial of equal protection of the laws, under the 14th Amendment. That decision constituted a precedent which, the plaintiff believes, has erroneously been used in numerous cases to uphold segregation, giving rise to the doctrine of separate but equal, which has been adhered to by the Commission and the District Court in this case. Experience has shown in every area where segregation is practiced that separation is enforced but the proviso of equality is never complied with.

This case involves the question of whether segregation is discrimination, because inequality invariably accompanies segregation, because the doctrine of substantial equality should not apply to fundamental, constitutional, personal rights, and whether segregation is discrimination *per se*. Second, there is presented the question whether a vacant seat may be denied any passenger solely because of his race. Third, with respect to national uniformity in interstate travel regulations, there is a conflict between the approved practice of racial segregation on interstate dining cars and the Supreme Court's prohibition of racial segregation in interstate motor travel as a burden on interstate commerce. Fourth, it involves the question whether allotment of seats according to race, based on the comparative volume of traffic, affords equality of treatment to the individual passenger. Fifth, there is involved the extent of the Commission's and the District Court's power and authority in approving a regulation, based solely on race, restricting plaintiff's liberty by enforced segregation, in the light of the national policy against racial distinctions and classifications, as expressed in the United States Constitution, treaties of the United States, Acts of Congress, and judicial decisions.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal

Mitchell v. *U. S.*, 313 U. S. 80;
Alton Rrd. Co. v. *U. S.*, 287 U. S. 229;
Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125.

F. Opinions and Decree

Appended to this statement are a copy of the opinion in this case on the first appeal (*Henderson* v. *U. S.*, 63 F.

Supp. 906) and of the opinion and decree of the District Court here sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court has jurisdiction of the appeal.

Dated November 17, 1948.

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APPENDIX "A"

Filed 17th December, 1945

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND

No. 2455. Civil Docket

We concur: Morris A. Soper, U. S. Circuit Judge; W. Calvin Chesnut, U. S. District Judge.

Argued September 24, 1945. Decided Dec. 17, 1945.

ELMER W. HENDERSON, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Soper, Circuit Judge, and Coleman and Chesnut, District Judges

Opinion of the Court

COLEMAN, *District Judge:*

This is a suit under the provisions of 28 U. S. C. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A. Sec. 17 (9), whereby the plaintiff seeks to set aside an order of the Interstate Commerce Commission, entered May 13, 1944, with respect to dining car service on the Southern Railway.

On October 10th, 1942, the plaintiff filed a complaint with the Commission alleging (as amended at the original hearing) that the Southern Railway, on May 17th, 1942, had, with respect to its dining car service, unjustly discriminated against him in violation of the provisions of Section 3(1) of the Interstate Commerce Act (49 U. S. C. A. sec. 3(1)), and Section 2, Par. 1 of Article IV of the Constitution of the United States, by failing to furnish him dining car service equal to that furnished white passengers. The complaint prayed that the Commission require the carrier to cease and

desist from the alleged discrimination; in the future to afford complainant and other interested Negro passengers dining car facilities and such other services and facilities as the Commission might deem reasonable and just, equal to those accorded its white passengers, and asked also for damages to be assessed against the carrier because of the alleged discrimination.

The Southern Railway answered the complaint, denying that it had violated any Constitutional provision or any provision of the Interstate Commerce Act or of any other law. The complaint, according to the usual procedure, was referred by the Commission to an examiner for the purpose of conducting a hearing, which was held on February 24th, 1943. At this hearing, complainant alone testified in his own behalf and six witnesses were heard for the railroad.

The examiner filed his report on May 28th, 1943, recommending that the Commission should find that complainant had been subjected to unjust discrimination and prejudice, but that the situation had been corrected for the future and that, therefore, the complaint should be dismissed. Complainant excepted to the examiner's report, alleging that the Virginia segregation statute (Virginia Code 1942, (Michie), Secs. 3962-68), upon which the examiner relied in part, was inapplicable; that segregation of races is contrary to the Federal Constitution and the Interstate Commerce Act; that damages should be assessed, and that the alleged discrimination and prejudice had not been corrected for the future. Thereupon, the complainant was granted a hearing before Division #2 of the Commission, briefs were filed and oral arguments submitted, and on May 13th, 1944, that Division filed its report (258 I. C. C. 413), making detailed findings of fact and conclusions based thereon, all of which are substantially in accord with the examiner's report and recommendations.

The material facts as found by the Commission and set forth in its report, are not disputed by the parties in the present proceeding, and are as follows: On May 17th, 1942, the complainant, a Negro, citizen of the United States, left Washington at approximately 2 P. M. aboard the Southern Railway's Train #35, for Atlanta, Ga., traveling as a first class Pullman passenger. The train consisted of 1 combi-

nation baggage-passenger car, 6 coaches, 2 Pullman cars and 1 dining car with seats for 36 persons. It carried approximately 300 passengers, about 100 more than the usual number, which necessitated the use of 3 extra coaches. The Pullman cars were in the rear of the dining car, thus making it necessary for Pullman passengers desiring dining car service to enter the diner alongside the kitchen of the dining car. From this end the tables on the left side of the diner accommodated 4 persons and those on the right side, 2 persons. The diner was equipped with curtains which, when drawn, separated the two tables nearest the kitchen from the other tables, these curtains extending, when drawn, from the sides of the diner to but not across its center aisle, nor along the aisle side of either of these end tables.

When the diner was opened about 5:30 P. M. on May 17th, 1942, and as the train was proceeding through the State of Virginia, a number of passengers were waiting to enter. It filled promptly. When all tables other than the two tables at the kitchen end of the car had been occupied, no Negro passenger having appeared, white passengers were seated at the end tables. Some of the passengers who were in line when the diner was opened, remained standing when the car was filled. Complainant did not take a position in the line but walked past people who were waiting to be served in turn. At least one seat at one of the end tables at the kitchen end of the diner was empty when complainant first demanded service but neither then nor later was either of these end tables entirely vacant. The diner was filled continuously, passengers from the line taking seats as soon as others vacated them, and from time to time diner patrons were served dinner until it became necessary to decline further service, in order that the car would be clear of patrons when the train reached Greensboro, North Carolina. Complainant was tendered and declined service in his Pullman car space without charge therefor in addition to the regular dining car prices. The service offered him differed from that furnished in the dining car only as respects the place of service. The steward did not send for complainant as he had promised to do because at no time during the meal period was there available space in which complainant could be served in the diner in a compartment separated from

tables that were occupied by white passengers. Complainant was one of many passengers who sought dining car service and who had not been served when the car was removed from the train at approximately 9:00 P. M.

For many years, it was defendant's practice to serve meals to passengers of different races at different times. Negro passengers, being in the minority, were served either before or after the white passengers had eaten. The increase in passenger traffic in 1941, due to defense activities, made necessary some plan whereby both races could be accommodated at the same time. It was found that the length of time required for serving white passengers would extend into the time for the next meal, leaving no time in which to serve Negro passengers. The installation of curtains was designed to correct that situation. Since the time of complainant's journey, defendant's dining cars have been equipped with 4-seat tables on both sides, thereby increasing to 48 the capacity of the car, and to 8 the number of seats at the end tables.

In July, 1941, defendant issued to its passenger department employees a circular of instructions concerning accommodations for passengers of different races, which contains the following:

"Dining Car Regulations

"Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

On August 6, 1942, these instructions were supplemented as follows:

"Effective at once please be governed by the following with respect to the race separation curtains in dining cars:

Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

"After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"'Reserved' cards are being supplied you."

As passengers enter the dining car when it is opened for meal service, it is defendant's practice to seat some of them at each waiter's "station", or group of tables so that all the waiters may be engaged promptly and service expedited. If any Negro passengers are present, they are seated and served at the end tables. Relatively few Negro passengers use the dining car, and for that reason the end tables are not absolutely reserved for their exclusive use; but white passengers are not seated at them until the other tables are filled. Then, if no Negro passengers present themselves, the end tables are used for white passengers. If a Negro passenger requests service when both end tables are fully or partially occupied by white patrons, the practice is to offer him service in his Pullman space or at his coach seat, using a portable table, without the extra charge usually made for that service. When so served, the passenger receives the same food and waiter service that is furnished dining car patrons, and the dishes, silverware, and linens are those used in the dining car. Negro civilians are served in the dining car simultaneously with white passengers only at the end tables. White and Negro soldiers are served together, without distinction.

On these facts the Commission made three ultimate findings, (1): That defendant's treatment of complainant with respect to dining car service subjected him to undue and unreasonable prejudice and disadvantage in violation of

Section 3 of the Interstate Commerce Act; but that (2): The defendant's dining car rules and regulations in effect at the time in question, when considered with defendant's supplementary rules and regulations issued on August 6th, 1942, are adequate, and therefore no order in respect to these rules was necessary for the future; and (3): That complainant had sustained no compensable damage as a result of the disadvantage caused him by defendant. Accordingly, the Commission issued its order on May 13, 1944, dismissing the complaint. Thereafter, complainant petitioned for a hearing before the full Commission, but this was denied by order entered September 18, 1944 and on January 26, 1945, the present proceeding was instituted. In the complaint it is alleged that the treatment given the complainant with respect to dining car service violated (1) Section 3(1) of the Interstate Commerce Act (49 U.S.C.A. Sec. 3(1)); (2) the national transportation policy as defined in that Act (49 U.S.C.A. Sec. 1, note); and (3) the Civil Rights Act, 8 U.S.C.A. Sec. 41, 43, enforcing Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The specific form of injunctive relief sought is that the Commission order the Southern Railway Company to cease and desist from the form of treatment with respect to dining car service given the complainant, and to establish and enforce in the future, for the benefit of complainant and other Negro passengers, dining car facilities and services unconditionally identical with those established and enforced for white passengers, including the discontinuance of the Railway Company's present practice of using curtains around dining car tables provided for Negro passengers. The complainant concedes that the Commission's denial of damages is not reviewable by this Court. See Standard Oil Co. *v.* U. S., 283 U. S. 235; George Allison & Co. *v.* United States, 296 U. S. 546; Ashland Coal & Ice Co. *v.* United States, — Fed. (2d) —, affirmed per curiam, — U. S. —.

For a proper understanding of what the Commission decided apart from the matter of damages, we quote the following from its opinion (258 I.C.C. 413, at pages 418-419):

"The Interstate Commerce Act neither requires nor prohibits segregation of the races. The regulations of a carrier requiring separation of white and Negro passengers have been held not unlawful when applied to interstate passengers. See Chiles v. Chesapeake & O. Ry. Co., 218 U. S. 71, and cases therein cited. Section 3(1) of the act provides that it shall be unlawful for any common carrier subject thereto to make, give, or cause any undue or unreasonable preference or advantage to any particular person in any respect whatsoever; or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. In Mitchell v. United States, 313 U. S. 80, 97, the Court said that while the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. Thus it is seen that substantial equality of treatment only is required of the carrier.

"It is clear that complainant returned to his seat after his various appearances in the dining car with the distinct impression or understanding conveyed to him by the steward that in a short time space would be available for serving him in the dining car and that he would be notified. The steward could have consummated his understanding with complainant by not allowing additional white passengers to be seated at the end tables. If that procedure had been followed, an end table would have been entirely vacated as soon as the white passengers, initially seated there, had completed their meals. As above indicated, complainant stresses the failure to seat him at an end table and to notify him as promised. In our opinion, the circumstances afford sufficient basis for a finding in favor of complainant.

"As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad judgment of an employee of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to

a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice, as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service.

"We find that complainant was subjected to undue and unreasonable prejudice and disadvantage in the respect already stated. As defendant's present instructions to its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose."

The questions presented for our determination in this proceeding are basically two, as evidenced by complainant's contentions, and may be summarized as follows: (1) Is any form of racial segregation of interstate passengers in dining cars a preference, prejudice or discrimination in and of itself in violation of the Civil Rights Act, or the Interstate Commerce Act, or both; and (2) even if a certain degree of such segregation be valid, are the present rules and regulations of defendant respecting its dining car service nevertheless invalid because they do not provide substantial equality of treatment in that (a) curtained tables are required for Negroes and not for white; and (b) service at such tables may be refused even though there be empty seats at such tables?

The position of the Interstate Commerce Commission is that (1) although it has found that in the particular instance complainant had been subjected to undue and unreasonable prejudice and disadvantage, it further found that such was the result of a casual incident and not of the Railroad's general practice, and therefore the entry of an order for the future would serve no useful purpose, and the decision of the Commission in this respect being founded upon a rational basis, should not be disturbed; and (2) to order the Commission to require the railroad to do more would be, in effect, to order that segregation cease, whereas neither the Commission nor this Court has jurisdiction in the present proceeding to determine whether or not segre-

gation in and of itself is a discrimination forbidden by the Constitution, the Interstate Commerce Act, or any other Federal statute.

The Southern Railway, as intervening defendant, contends that the finding that its existing rules are adequate, is a determination of fact within the exclusive jurisdiction of the Commission, and therefore may not be upset by this Court.

The Government has not seen fit to be represented separately and to take part in any phase of this litigation from its inception, as it has the statutory right to do. This, however, does not foreclose the intervening defendant, the Southern Railway, from challenging the actions of the Commission. Interstate Commerce Commission *v.* Oregon-Washington Railroad Co., 288 U. S. 14.

At the outset we must determine whether there is any merit in the jurisdictional question raised by the Commission, namely, that this Court may not alter the Commission's finding of equality of treatment since that is a determination of fact exclusively within the jurisdiction of the Commission.

The Commission's position, it will be seen, is tantamount to saying that in a case of this kind judicial review of the Commission's action is completely foreclosed, even as respects the question of whether it may have exceeded its statutory or constitutional authority in entering a particular order. We do not understand that such is the law. The Supreme Court said in Rochester Telephone Corp. *v.* United States, 307 U. S. 125, 139, that two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission have been evolved. "One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426. Thereby matter which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. *Only questions affecting constitutional power, statutory authority, and*

the basic pre-requisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Comm'n. *v.* Illinois Central R. Co., 215 U. S. 452, 470; Interstate Commerce Comm'n. *v.* Union Pacific R. Co., 222 U. S. 541." (Italics inserted).

The complainant is directly asserting in this proceeding that to allow the Commission's order here under review to stand, would be tantamount to approving a rule or practice on the part of the Southern Railway that is violative of complainant's constitutional rights and not within the statutory power of the Interstate Commerce Commission to approve, so we are called upon not merely to review the correctness of a factual situation upon which the Commission has ruled, in a field exclusively within its province,—as for example, one involving rates or other charges by an interstate carrier,—but to rule upon questions, the determination of which has not been, and cannot be exclusively delegated to any administrative body, but must remain subject to judicial review. The fact that the Commission's order is negative in form, i.e., that it dismissed the complaint, makes no difference. Rochester Telephone Corporation *v.* United States, supra; Mitchell *v.* United States, 313 U. S. 80.

We turn then to a consideration of the first of complainant's two basic contentions: namely, that any form of racial segregation of interstate passengers in dining cars should be declared to be, in and of itself, a form of discrimination forbidden by the Federal Constitution and the Interstate Commerce Act.

We must at the very outset recognize the distinction between segregation and equality of treatment. The equal rights clause of the Constitution, Article IV, Section 2, does not import that a citizen of one State carries with him into another State any fundamental privileges or immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but simply that in any State, every citizen of every other State shall have the privileges and immunities which the citizens of that State enjoy. In short, this provision merely prevents a State from discrimi-

nating against citizens of other States in favor of its own citizens. Downham *v.* Alexandria Council, 10 Wall. 173; Chambers *v.* Baltimore & Ohio R. R. Co., 207 U. S. 142; LaTourette *v.* McMaster, 248 U. S. 465; Chalker *v.* Birmingham & N. W. Rwy. Co., 249 U. S. 522; Shaffer *v.* Carter, 252 U. S. 37; United States *v.* Wheeler, 254 U. S. 281; Douglas *v.* New York, New Haven and Hartford Ry. Co., 279 U. S. 377; Whitfield *v.* Ohio, 297 U. S. 431; Hague *v.* C. I. O., 307 U. S. 496. Similarly, the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgment. The Slaughterhouse Cases, 16 Wall. 36. And it has been repeatedly declared by the Supreme Court that race segregation by State law is not per se an abridgement of any constitutional right secured to the citizen. See Plessy *v.* Ferguson, 163 U. S. 537; McCabe *v.* Atchison T. & S. F. Ry. Co., 235 U. S. 151; Missouri ex rel. Gaines *v.* Canada, 305 U. S. 337. By virtue of the Commerce Clause of the Constitution, Congress might legislate specifically with respect to segregation in interstate travel, but Congress has not done so. However, Section 3, paragraph 1 of the Interstate Commerce Act makes it unlawful to subject any person in interstate commerce to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and this prohibition clearly embraces the matter of dining car facilities, just as seating, sleeping or any other facilities in interstate commerce. Stamps *v.* Chicago R. I. & P. Ry. Co., 253 I. C. C. 557; LeFlore & Crishon *v.* Gulf, M. & O. R. R. Co., 262 I. C. C. 403; Barnett *v.* Texas & P. Ry. Co., — I. C. C. —. Furthermore, the right to a particular accommodation or facility does not depend upon the volume of traffic, because although the supply of particular accommodations or facilities may be conditioned upon there being a reasonable demand therefor, if such accommodations or facilities are in fact provided, substantial equality of treatment of persons traveling under like conditions cannot lawfully be withheld. Mitchell *v.* United States, supra. Thus, while inaction of Congress as respects segregation in interstate travel is equivalent to a declaration that interstate carriers can separate Negro and white pas-

sengers, they may do so only if they afford substantial equality of treatment to members of both races when traveling under like conditions. Hall *v.* deCuir, 95 U. S. 485; Louisville, etc., Railway Co. *v.* Mississippi, 133 U. S. 587; Plessy *v.* Ferguson, supra; Chesapeake & Ohio Ry. Co. *v.* Kentucky, 179 U. S. 388; Chiles *v.* C. & O. Ry. Co., 218 U. S. 71; McCabe *v.* Atchison T. & S. F. Ry. Co, supra. Therefore, although the Supreme Court of Appeals of Virginia has held, since the Commission decided the present case, in Morgan *v.* Commonwealth, 34 S. E. (2d) 491, that the Virginia segregation laws with respect to public motor carriers, which are kindred to that State's segregation laws with respect to rail carriers—all of which laws were in effect at the time the discrimination against the present complainant is alleged to have occurred,—apply to interstate as well as intrastate passengers, it is not necessary to approach the present case from this aspect, because, as we have said, the real question before us is not one of segregation, but of equality of treatment. Furthermore, the Commission in its opinion does not rely upon State statutes or decision; and likewise, the railway company does not rely upon them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case because it does not, at least in terms, purport to embrace dining car service. Virginia Code 1942 (Michie) Sec. 3962-3. These sections read: "Sec. 3962. SEPARATE CARS FOR WHITE AND COLORED PASSENGERS.—All persons, natural or artificial, who are now, or may hereafter be, engaged in running or operating any railroad in this State by steam for the transportation of passengers are hereby required to furnish separate cars or coaches for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial partition, with a door therein, shall be deemed a separate coach within the meaning of this section, and each sepaarte coach or compartment shall bear in some conspicuous place appropriate words in plain letters, indicating the race for which it is set apart." "Sec. 3963. COMPANY TO MAKE NO DISCRIMINATION IN QUALITY OF ACCOMMODATIONS FOR WHITE AND COLORED PASSENGERS.

—No difference or discrimination shall be made in the quality, convenience, or accommodation in the cars or coaches or partitions set apart for white and colored passengers under the preceding section." Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case, because nothing meaning of this section, and each separate coach or compartments "divided by a good and substantial partition, with a door therein," would satisfy those provisions.

It therefore being clear that racial segregation of interstate passengers is not per se forbidden by the Constitution, the Interstate Commerce Act, or any other Act of Congress, we turn to a consideration of complainant's second contention, which is that, even though it be held that the defendant carrier may lawfully segregate complainant because of his race while affording him dining car facilities, the segregation actually still permitted by the defendant railroad's present regulations which the Commission has approved is unlawful; because not affording him treatment substantially equal to that afforded white passengers under like conditions.

This contention brings us at once face to face with the necessity of passing upon the validity of the dining car regulations of the Southern Railway, in effect at the time in question, because although these regulations have not been promulgated by the Interstate Commerce Commission, they have been directly approved by it, as a result of its decision and order which is the basis of the present complaint. Therefore, they are to be treated, for the purposes of this case, as in effect the Commission's rules. This is obviously true for the further reason that the present complainant is contending that the Commission erred in not requiring the Southern Railway to cease and desist from applying these rules; or more specifically, that the Southern Railway should be required henceforth to abstain from adopting any rule or regulation with respect to its dining car service that imposes,—as it is claimed the present rules do,—upon Negro passengers, restrictions not imposed upon white passengers, under like conditions. Complainant's right to complain does not depend upon

whether he intends to make a similar journey in the future. Mitchell *v.* United States, supra.

These dining-car regulations have been quoted in an earlier part of this opinion in their entirety. It is to be noted that what the present complainant is really seeking is that he shall be given an absolute right to—a guarantee of—*the same service in every respect* accorded to white passengers under like conditions. The defendant's dining-car regulations in effect on May 17th, 1942, that is, at the time of the alleged discrimination against the complainant, contained only a very general provision with respect to service of meals in dining cars at one and the same time to Negro and white passengers. They merely provided that "if the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartments set aside for them."

As we have seen, applying his own interpretation to this rule, the dining car steward allowed white passengers to occupy the end seats allotted to colored passengers before the complainant appeared and applied for diner service; and that, since the train was crowded with white passangers, he, the steward, continued to allow additional white passengers to be seated and served at these end tables, with the result that there never was a time during the hours when the dining car was open to passengers, that meals could be served therein to the complainant or to any other Negro passengers, at any table at which there were not one or more white passengers. This, as we have seen, the Commission found resulted in an unjust, undue and unreasonable prejudice and disadvantage to complainant in violation of Section 3 (1) of the Interstate Commerce Act. It is our opinion that this conclusion was correct. However, the Commission further found that the supplementary dining car regulations put into effect by the defendant carrier on August 6th, 1942, adequately provided against the recurrence of such prejudice and disadvantage as respects complainant or any other possible Negro passengers on defendant's lines, and therefore, the Commission deemed the entry of an order for the future would serve

no useful purpose. We are thus called upon to determine whether or not this interpretation by the Commission of the carrier's rules now in effect is correct; that is to say, we must determine whether they do, in fact, afford substantial equality of treatment to both Negro and white passengers with respect to dining car service.

We requote the pertinent parts of these supplementary instructions as follows: "Before starting each meal pull the curtains to service position and place a "reserve" card on each of the two tables behind the curtains.

"These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables. After the tables are occupied by white passengers, then should colored passengers present themselves, they should be advised that they will be served just as soon as those compartments are vacated."

It is to be noted that the above instructions do not in fact require the setting aside of the two tables referred to *exclusively* for Negro passengers, but merely say that they "are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed, and white passengers served at those tables. Obviously, the word "then" refers to any time during which meals are being served when there happen to be more white passengers applying for meals than can be accommodated at other than the reserved tables. At least if it does not mean this, it gives no indication to the steward as to how long he should wait before assuming that no Negro passengers *will* present themselves. Nothing is contained in the regulations requiring the steward to take steps to ascertain whether there be any such persons on the train. Furthermore, the regulations do not take into account the probability that a Negro passenger may not desire a meal as soon as he boards the train and the dining car opens, or that he may board the train at an intermediate point after the dining car service has been begun and may

desire at that time or later to be served in the dining car. In none of these contingencies do the regulations offer any assurance that the Negro passenger will have a reasonable chance to be served in the dining car before his journey ends.

Therefore, we believe that the Commission erred in holding that the defendant's general practice as evidenced by its current instructions, will result in no substantial inequality of treatment as between Negro and other passengers seeking dining car service. In the case of the white passenger, he is merely required to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionally reserved for Negro passengers' use has been assigned to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eye of the law requires. None of the methods of segregation have been employed which have heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of the car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

We accept the Commission's construction of the supplemental regulation and its finding that the general practice thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But nevertheless in our opinion the regulation so construed, applied and practiced does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the

segregation of white and colored passengers by the reservation of particular tables for colored passengers; nor do we think it unreasonable, in view of the recently prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers, or if none there, elsewhere in the dining car.

The analogy of the Mitchell case is very close. There Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at 96-97): "It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specially assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passenger cannot, the latter are subjected to inequality and discrimination because of their race.' . . .

"While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charge does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner, and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served in coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again, the analogy to the Mitchell case is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches.

There remains to be considered one additional contention of the complainant, namely, that that part of the railroad's regulations which requires tables for Negro passengers in dining cars to be curtained also violates the rule of substantial equality in that such means of separation causes Negro passengers humiliation and embarrassment to which white passengers are not subjected. Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine.

For the reasons given, herein the order of the Commission dismissing the complaint must be set aside and the case remanded to the Commission for further proceedings in the light of the principles outlined herein.

WILLIAM C. COLEMAN.

APPENDIX "B"

Opinion—Filed 25 September 1948

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MARYLAND

Civil No. 3829

Argued June 4th, 1948. Decided September 25, 1948

ELMER W. HENDERSON, *Plaintiff*,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, *Defendants*.

Lawson, McKenzie & Windsor (B. V. Lawson, Jr., of Washington, D. C.; Josiah F. Henry, Jr., of Baltimore), for plaintiff.

Daniel W. Knowlton and Allen Crenshaw for Interstate Commerce Commission.

Bernard J. Flynn, United States Attorney, and Charles Clark and A. J. Dixon, of Washington, D. C., for Southern Railway Co.

Before Soper, Circuit Judge, and Coleman and Chesnut, District Judges

Order of Interstate Commerce Commission—Dining Car Service Afforded Negro Passengers on The Southern Railway—Alleged Discrimination—Complaint Dismissed.

COLEMAN, *District Judge*:

This suit is brought by the plaintiff, under the provisions of 28 U. S. C. A. Secs. 41 (28), 43-48, 792, and 49 U. S. C. A. Sec. 17 (9), to set aside an order of the Interstate Commerce Commission entered on September 5th, 1947. The contested order involves dining car service afforded Negro passengers on the Southern Railway. This is the second time that the present plaintiff has litigated

the question before the Commission and this Court. The Southern Railway asked for, and was granted leave to intervene as a party defendant, it having been the sole defendant in the proceeding before the Commission which resulted in the issuance of the order which plaintiff now seeks to annul.

The facts involved in the prior proceeding, before both the Commission and this Court, which led up to the present suit may be summarized as follows: On October 10th, 1942, the plaintiff, a Negro, filed a complaint with the Interstate Commerce Commission alleging that on May 17th, 1942, while traveling as a first class passenger on the Southern Railway from Washington, D. C., to Atlanta, Georgia, that Railway subjected him to undue and unreasonable prejudice and disadvantage, in derogation of his rights under the Federal Constitution and the Interstate Commerce Act, (1) by providing insufficient tables and service for Negroes in its dining car; (2) by the use of a curtain around the tables allegedly reserved for Negroes; and (3) by giving preference and advantage to white persons, in that it failed and refused to serve plaintiff at tables in its dining car where there were empty seats, these tables and seats, although allegedly reserved for Negroes, being allowed to be used by white persons. The Commission was asked to require defendant to desist from such discrimination and in the future, to establish for the transportation of Negro interstate passengers over its lines equal and just dining car facilities, and such other services and facilities as the Commission might consider reasonable and just. Plaintiff also asked for damages by reason of the alleged discrimination.

After due hearing, on May 13th, 1944, Division No. 2 of the Commission rendered its report (258 I. C. C. 413) in which it found that while plaintiff had been subjected to undue and unreasonable prejudice and disadvantage, it, nevertheless, found that there was no basis for an award of damages by way of reparation, or necessity for an order for the future. The Commission said (258 I. C. C. 419): "As far as the record is concerned, the occurrence complained of was but a casual incident, brought about by bad

judgment of an employee (The dining car Steward) of the defendant who had an overload of work to be done in a limited space and short time. The difficulties encountered were, no doubt, due to a large extent to the overcrowding of the train, resulting from war-time conditions. The record does not disclose that the defendant's general practice as evidenced by its present instructions, will result in any substantial inequality of treatment as between Negro and other passengers seeking dining car service.

"* * * As defendant's present instructions to its employees seem adequate, the entry of an order for the future in this respect would serve no useful purpose." Accordingly, the Commission dismissed the complaint.

On appeal to this Court to set aside the action of the Commission, we held (Henderson *v.* United States, 63 F. Supp. 906) that while racial segregation of interstate passengers is not per se forbidden either by the Federal Constitution, the Interstate Commerce Act or any other Act of Congress, the Commission, nevertheless, erred in holding that the Southern Railway's general practice, as evidenced by its then current dining car regulations or instructions, would result in no substantial inequality of treatment between Negro and other passengers seeking dining car service. We so found for the reasons as stated in our detailed opinion, as follows (63 F. Supp. 906 at 915-916): "In the case of the white passenger, he is merely required (by the Railway's dining car regulations) to wait his turn along with all other passengers, whereas in the case of the Negro passenger, he is given a like opportunity along with other Negro passengers only in the event that when he presents himself at the dining car, none of the seats conditionallly reserved for Negro passengers' use has been assigned to a white passenger; and if it has been so assigned, then, even when vacated, it nevertheless remains unavailable to him unless and until all of the other seats under the same conditional reservation are not in use by white passengers. It seems obvious to us that this arrangement does not afford that substantial equality of treatment which the equality of all citizens in the eye of the law requires. None of the methods of segregation have been employed which have

heretofore been deemed to be within the law, such as the service of the races under like conditions at different times or the setting aside of a separate car or a portion of a car for the colored race; and while the great majority of the tables are set aside for the exclusive use of white passengers, none are set aside exclusively for Negro passengers.

"We accept the Commission's construction of the supplemental regulation and its finding that the general practice thereunder was that no further white passengers could be seated at the tables reserved for colored passengers after one of the latter applied for dining car service. But, nevertheless, in our opinion the regulation so construed, applied and practised, does not constitute substantial equality of treatment for white and colored passengers. We do not question the authority of the Commission to approve the segregation of white and colored passengers; nor do we think it unreasonable, in view of the recently prevailing abnormal demands on the railroads for passenger and dining car transportation services, that white passengers should be seated at tables reserved for colored passengers when there are no colored passengers applying for service. But if white passengers are thus seated at the tables reserved for colored passengers, then equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers or, if none there, elsewhere in the dining car.

"The analogy of the Mitchell case is very close. There, Mr. Chief Justice Hughes, in the course of the Court's opinion, said (313 U. S. 80, at pages 96, 97, 61 S. Ct. 873, at page 877, 85 L. Ed. 1201): 'It does not appear that colored passengers who have bought first-class tickets for transportation by the carrier are given accommodations which are substantially equal to those afforded to white passengers. The Government puts the matter succinctly: "When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is

available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.'

* * * * * * *

" 'While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused.'

"The alternative offered the Negro passenger of being served at his seat in the coach or in the Pullman car without extra charges does not in our view afford service substantially equivalent to that furnished in a dining car. True, some passengers may prefer not to patronize a diner, and we will assume that the menu is the same and the service scarcely, if at all, less expeditious when meals are served on coaches or Pullman cars. Nevertheless, the Negro passenger is entitled to dine with friends if he sees fit to do so, and should not be unnecessarily subjected to the inconvenience of dining alone under the crowded conditions which service, especially in a coach or in a sleeper, may entail. Here again the analogy to the Mitchell case is so close as to compel a like conclusion with respect to furnishing meals in Pullman cars or in coaches."

With respect to the requirement in the Southern Railway's then current dining car regulations that tables for Negro passengers be curtained, we found that this did not violate the rule of substantial racial equality, and stated that the method of carrying out the principle of racial segregation on interstate carriers was a matter for the Commission to determine. However, for the other reason just stated, by decree entered on February 15th, 1946, this

Court set aside the order of the Commission dismissing the complaint, and remanded the case to the Commission for further proceedings "in the light of the principles outlined" in our opinion. As a result, the Southern Railway thereupon issued, effective March 1st, 1946, the following new instructions for the regulation of its dining car service, canceling the instructions previously in effect:

"Subject: Segregation of White and Colored Passengers In Dining Cars.

To: Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above, from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A 'Reserved' card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules."

The Commission reopened the proceeding for further hearing; the Southern Railway presented additional evidence, and on September 5th, 1947, the Commission filed a report (two Commissioners dissenting in part) in which it affirmed its prior findings to the effect that whereas complainant had been subjected to undue and unreasonable prejudice and disadvantage on one particular occasion, no basis for an award of damages had been shown, and further

found that the new dining car regulations established by defendant, effective March 1st, 1946, and currently in force, which we have above quoted, were not in violation of Section 3 or any other provision of the Interstate Commerce Act. Accordingly, the Commission refused to enter an order for the future, and dismissed the complaint, whereupon the present suit was brought seeking to annul this latest action on the part of the Commission.

It will thus be seen that the precise question presented for decision is whether the Interstate Commerce Commission, by this second report and order, has fully complied with the direction given to it by this Court when we reversed the earlier action of the Commission, dismissing the complaint and remanded the proceeding to the Commission "for further proceedings in the light of the principles" set forth in our opinion.

The sum and substance of the Commission's position is that the same facts and issues are involved in this proceeding as in the previous one, with the exception of the Southern Railway's amended dining car regulations; that these amended regulations promulgated by the Railway as a result of our prior ruling, have removed the discrimination found by this Court to have been latent in the Railway's previous regulations, namely, that the Railway now provides adequately and reasonably for the equality of service and treatment of Negroes and whites as required by our decision. We quote the following from the Commission's report (269 I. C. C. 73 at —): "The current regulations were designed by the defendant to meet the Court's criticisms, of those, set forth at page 415 of the prior report, which they superseded. By the new rules, defendant has abolished its former practice, condemned by the court, of permitting white patrons to be seated at the tables conditionally reserved for colored passengers when all other tables had been occupied, and of refusing to permit a Negro, who applied for service after the tables so reserved for member of his race had been fully or partially occupied by white patrons, to take any vacant seat in the car. Its rules now provide for the absolute reservation of space for the use of Negro passengers exclusively. Under no

circumstances are white passengers served in such space; nor are colored passenger served elsewhere in the car. In these respects defendant's present practice appears to conform with the opinion of the court.

"Concerning the adequacy of the space reserved for Negro passengers, defendant's Superintendent of Dining Cars presented in evidence the results of two tests made under his direction and supervision showing the number of meals served to white and Negro patrons, respectively, in dining cars operated by defendant between Washington, D. C., and Atlanta, Ga. During the 11 days, May 14 to 24, 1945, a total of 37,615 meals were served, of which 446, or 1.19 per cent., were served to Negro civilians and 706, or 1.88 per cent., to Negroes in the miltary service. Of 20,789 meals served during the first 10 days of October, 1946, 723 or 3.48 per cent. of the total, were served to Negro civilians and 149, or 0.72 per cent., to Negro service people. It is defendant's practice to serve white and Negro soldiers together, without distinction. Under the current regulations setting apart four seats for Negroes, slightly more than 8 per cent. of the seating space in its dining cars is reserved unconditionally for the use of approximately 4 per cent. of the patrons. The capacity of the cars, now 48 seats, will be reduced to 44 seats as the offices for stewards are installed. A further fact disclosed by the described tests is that rarely is defendant requested to provide diner service for more than four Negroes at the same meal.

"As stated, the ratio of the number of meals served Negro civilians to the total number served all patrons increased from 1.19 per cent. during the May, 1945 test period to 3.48 per cent. during the October, 1946, period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the conclusion is inescapable that defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space."

With respect to the curtains separating the tables reserved for Negroes from the other tables, the Commission in its

report said (269 I. C. C. 73 at —): "At the time of the further hearing, the defendant had removed the curtains from one of its dining cars and had constructed in their stead permanent wood partitions approximately 5 feet high extending from the sides of the car to the aisle. The table which formerly occupied the space opposite the one now reserved exclusively for colored passengers, as described in rule (1) of the foregoing regulations, has been removed and the space is utilized as an office for the steward. That position affords the best view of the entire car, including the entrance to the kitchen and pantry and from it the steward can best supervise the service. As its dining cars are sent to the shops for repairs in the future, it is defendant's intention to make similar structural changes in all of them.

The case is before us on the testimony presented to the Commission. The correctness of its factual analysis of this testimony as contained in its report is not questioned. Thus, it will be seen that the Railway's amended dining car regulations, contrary to the prior regulations, require the setting aside of a table, seating four persons, exclusively for the use of Negro passengers. Also, the uncontradicted evidence presented to the Commission shows that up to the date of the Commission's decision the number of Negro passengers seeking dining car service rarely if ever exceeded that number on any one trip. Should that happen, however, the situation would be no different from those instances not infrequently occurring in interstate railroad transportation, where more white passengers seek dining car service than can be seated at one time. In short, the new regulations, the Commission found, are designed to take into account, with all due regard to the density of Negro travel requiring dining car service, the probability that a Negro passenger may not desire a meal as soon as he boards the train, or that he may board the train at an intermediate point after the dining car service has been begun, and may desire at that time or later to be served in the dining car.

Next, as concerns the matter of curtains separating Negro dining car patrons from the white patrons, in our

prior opinion we stated (63 F. Supp. 906 at 916) that "Without minimizing the criticism directed at this feature of the service, we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine." As above explained, the Railway Company is now in the process of abandoning the use of curtains as a means of separating the tables and, in their stead, is construeting in its dining cars permanent, wooden partitions, approximately five feet high, extending from the side of the car to the aisle.. Also, it is removing from all of its dining cars the table which had formerly occupied the space directly opposite the table now exclusively reserved for colored passengers, and this space is being utilized as an office for the dining car steward. As also explained in its report, the Commission, in Mays vs. Southern Railway Company, 268 I. C. C. 352, decided April 8, 1947, had before it this same question, under precisely the same dining car regulations as those now before us, and found that there was no basis for holding this manner of separation of the different tables to be a forbidden discrimination.

We are satisfied, without further quoting from or analyzing the report of the Commission, that the inequality which we found to exist in the Railway Company's earlier dining car regulations, as respects the facilities afforded white and Negro passengers, has been removed by the Railway's amended regulations. We also believe there is no sound basis for treating the matter of fixed partitions between the tables differently from our treatment of the use of curtains. The same applies also to the location of the table allotted to colored passengers. We do not find that the Commission has permitted the Railroad to create an unjust discrimination by allotting to such passengers a table at the kitchen end of the dining car, directly opposite the space newly provided for the stewards office. The undesirability of this location compared with that of tables in other parts of the dining car, from the point of view of noise, heat, etc., as alleged by plaintiff, is, we think, non-existent. Therefore, it necessarily follows that this present complaint must be dismissed unless the Supreme Court has, in some decision

or decisions rendered since the date of our earlier decision, extended the principles which it had previously announced with respect to the matter of equality of treatment of the races when engaged in interstate transportation.

We turn then to a consideration of whether any pertinent decisions have been rendered by the Supreme Court subsequent to our earlier decision. We find only two cases, namely, Morgan vs. Virginia, 328 U. S. 373, and Bob-Lo Excursion Co. vs. Michigan, 333 U. S. 28, sufficiently related to invite attention. At the time of our previous opinion the Morgan case had been decided by the Supreme Court of Appeals of Virginia, 184 Va. 24, but the appeal therein to the Supreme Court was still undecided. As pointed out in our previous opinion, that case involved the validity of a Virginia statute and State court action to enforce the same, and did not involve, as does the case here, the validity of the regulations of a common carrier. The Supreme Court reversed the State Court and held unconstitutional, as a burden on interstate commerce, the Virginia statute which required separation of the races in motor buses. This requirement was described by the Supreme Court in its opinion as follows (328 U. S. 373 at 361): "On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey when 'necessary or proper for the comfort or convenience of passengers.' This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey."

In our consideration of the Morgan case in our earlier opinion, as that case then stood, we stated (63 F. Supp. 906 at 913-914) that "it is not necessary to approach the present case from this aspect (the fact that Virginia's segrega-

tion laws were applicable alike to interstate as well as intrastate rail transportation) because as we have said, *the real question before us us is not one of segregation, but of equality of treatment.* Furthermore, the Commission in its opinion does not rely upon State statutes or decisions; and likewise, the Railway Company does not rely on them. As a matter of fact, the Virginia statute could not be successfully relied upon in the present case, because it does not, at least in terms purport to embrace dining car service. * * *" Then, after quoting the Virginia statute, we said: "Note the above provisions, even if they could be said to embrace dining cars, have not been satisfied in the present case because nothing short of race segregation in separate cars, or in compartments 'divided by a good and substantial partition, with a door therein,' would satisfy those provisions."

That the Supreme Court in the Morgan case very definitely recognized the distinction between the two types of cases, namely those involving the validity of a State statute and those involving the rule of a carrier requiring segregation of interstate passengers is indicated by the following footnote on page 377 of its opinion: "When passing upon the rule of a carrier that required segregation of an interstate passenger, this Court said, 'And we must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make.' Chiles vs. Chesapeake & Ohio R. R. Co., 218 U. S. 71, 75." See also Simmons vs. Atlantic Greyhound Corporation, 75 F. Supp. 166; Stamps vs. Louisville & Nashville Railroad Co., I. C. C. .

The Commission in its report now under review, clearly stated, we think the distinction between the two types of cases in the following language (269 I. C. C. 73 at —): "Defendant's dining car regulations apply only to service in dining cars which cars are not permittel to leave its lines. They apply uniformly over defendant's entire railroad system, embracing approximately 8,000 miles of lines extending into all southeastern States. Their enforcement cannot in any circumstances result in disturbance to passengers by forcing them to change seats upon crossing

State lines, a requirement of the Virginia statutes which the courts condemn as imposing an undue burden on interstate commerce."

We turn then to the only other case decided by the Supreme Court since our earlier opinion in this proceeding was rendered, which likewise appears pertinent but actually is not, to the present issue, namely Bob-Lo Excursion Company *vs.* Michigan, supra. There, it was decided that a Michigan statute prohibiting Negro segregation in all public service including transportation, was legally enforceable with respect to refusal of a Michigan corporation, engaged chiefly in the round-trip of passengers from Detroit to Bois Blanc Island, Canada, to sell a ticket to a Negro for transportation to the latter resort which was reserved for white people, because, although the Michigan corporation was engaged in foreign commerce, application of the Michigan law to appellant was held not to contravene the commerce clause of the Federal Constitution.

In its opinion in the Bob-Lo Excursion Company case, the Supreme Court distinguished Morgan *vs.* Virginia, supra, and Hall *vs.* Decuir, 95 U. S. 485, saying (333 U. S. 28 at 39-40): "The regulation of traffic along the Mississippi River, such as the Hall case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here."

The even more recent decisions of the Supreme Court involving deed covenants prohibiting sales of realty to Negroes, Shelley *vs.* Kraemer, — U. S. —; Hurd *vs.* Hodge, — U. S. —; McGhee *vs.* Sipes, — U. S. —, and Uricolo *vs.* Hodge, — U. S. —, obviously have no relation, directly or indirectly, to the issue in the present case. Those decisions do not hold that race segregation in respect to deed covenants is forbidden. On the contrary, they recognize the legality of agreements to this effect. They merely hold that such agreements, although lawful, are not enforceable by court process. Thus, they have no relation to the principles governing the conduct of interstate transportation by common carrier.

Reliance is also placed by counsel for plaintiff upon Matthews *vs.* Southern Railway Company, 157 F. (2d) 609. There, the only issue was the correctness of the trial judge's charge to the jury in a race separation case. The Court of Appeals for the District of Columbia, in a footnote reference to the Morgan case, said (page 610) it could see "no valid distinction between segregation in buses and in railroad cars." We believe that we have already addressed ourselves sufficiently to this point to indicate that, in our opinion, there *is* a very definite distinction from the aspect of dining car accommodations during railroad transportation.

To summarize and conclude: (1) Racial segregation of interstate passengers is not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act or any other Act of Congress as long as there is no real inequality of treatment of those of different races. (2) Allotment of seats in interstate dining cars does not per se spell such inequality as long as such allotment, accompanied by equality of meal service is made and is kept proportionately fair. This necessity was recognized by the Commission in its report on which the order now approved by us is based, when it said (269 I. C. C. 73 at —): "'Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future.'" To the argument that proportionate allotment of tables is only just and equitable so long as persons may find seats at a table assigned to their respective races, and fails to meet the equality test when there is *any* empty seat in the dining car which a person of either race is forbidden to occupy, suffice it to say that this argument denies the very premise from which we start, namely, that racial segregation is not, per se, unconstitutional. Since this is true, we fail to see that a situation such as that just referred to produces a result any more unjust or inequitable from a legal approach,—which must be this Court's approach to the question,—than the no doubt common situation where both white and colored passengers may

be kept waiting to secure seats at tables allotted to their respective races, because, for the time being, *every* seat in the dining car may be occupied.

For the reason herein set forth the complaint must be dismissed.

I concur.

W. CALVIN CHESNUT,
U. S. District Judge.

APPENDIX "C"

SOPER, *Circuit Judge* (dissenting):

Insofar as the opinion of the court sustains the Railroad Company's dining car regulations on the ground that they made adequate provision for the number of Negro passengers likely to apply for service, I am constrained to dissent. The Railroad Company has found that less than 4 per cent of its dining car patrons are Negroes, and it reserves 8 per cent of the available space for their exclusive use. This arrangement on its face seems fair to the Negro race, but it is based on the erroneous assumption that the rights which the Fourteenth Amendment is designed to protect are racial rather than personal in their nature. The regulations set aside one table in the dining car exclusively for Negroes and ten tables exclusively for whites, and the result is that occasionally a member of one race is denied service which is then available to a member of the other. Whenever this occurs, the Railroad Company discriminates against one passenger in favor of another because of his race, and deprives him of equality of treatment, and it is no answer to say that the Railroad Company has taken reasonable precautions to prevent the occurrence. It is true that segregation of the races is lawful provided "substantial equality of treatment of persons traveling under like conditions" is accorded; but the right belongs to the individual and not to the race, and segregation must be abandoned, or at least temporarily suspended, whenever its enforcement deprives the individual of treatment equal to that accorded to any other person at the same time.

Segregation in railroad traffic may be maintained if there are sufficient accommodations for all; but a vacant seat may not be denied to a passenger simply because of his race. The decisions of the Supreme Court support this view. In McCabe *v.* A. T. & S. F. Ry. Co., 235 U. S. 151 (1914), the court upheld an Oklahoma statute which required the Railroad Company to provide separate but equal accommodations for the two races in intrastate railroad travel, but struck down a section of the Act which permitted the carrier to provide sleeping cars, dining car, or chair cars to be used exclusively by either white or Negro passengers, separately but not jointly. It is not questioned that the meaning of this provision was that the carrier might provide these cars for white persons but need not provide similar accommodations for Negroes, because there were not enough Negroes seeking these accommodations to warrant the expense of providing them. Justice Hughes, in holding this section unconstitutional, said: (pp. 161-2):

"This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon their being a reasonable demand therefor, but if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

It may be suggested that the McCabe case is distinguishable because in that case the Railroad Company made no provision for colored passengers desiring first class service, whereas the regulations under examination in the present case are designed to care for all colored passengers that may be reasonably expected to apply. The distinc-

tion, however, is one of degree and not of principle, for in both cases the arrangement is designed to take care of the demands of the race rather than those of the individual citizen. Moreover, in 1940, the Supreme Court in Mitchell v. United States, 313 U. S. 80, reiterated the ruling that constitutional rights are personal and not racial, in a case where the carrier contemplated the probability that Pullman service would be demanded by Negroes, but made insufficient provision to meet the demand. Whenever that occurred, the court said, the Railroad Company was required to abandon the policy of segregation and seat the colored passenger in the car ordinarily reserved for whites. It had been the practice of the Railroad Company to accommodate the occasional Negro applicant for a chair in a Pullman car by giving him a seat in a drawing room at the same rate as was charged for a seat in the body of the car, but to compel the passenger to take a place in an ordinary coach when no drawing room was available. Adopting the view of the Government which opposed the regulation, Chief Justice Hughes, speaking for the court, said: (pp. 96-7)

"The Government puts the matter succinctly: 'When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger. But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations. So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.' And the Commission has recognized that inequality persists with respect to certain other facilities such as dining car and observation-parlor car accommodations.

"We take it that the chief reason for the Commission's action was the 'comparatively little colored traffic.' But

the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. McCabe v. Atchison T. & S. F. Ry. Co., supra. While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. Id. See, also, Missouri ex rel. Gaines *v.* Canada, pp. 350, 351 (305 U. S. 337). And the Interstate Commerce Act expressly extends its prohibition to the subjecting of 'any particular person' to unreasonable discriminations."

The same principle was again approved by the Supreme Court in the recent case of Shelley *vs.* Kraemer, 68 S. Ct. 836, which dealt with the validity of restrictive covenants in deeds designed to exclude Negroes from the ownership or occupancy of real property. The court held that covenants of this nature are unenforceable and, pointing out that the constitutional rule of equality is personal, declared that the denial of such a right to a Negro is not validated by the denial of the right under like circumstances to a white person. Chief Justice Vinson said: (p. 846)

"Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or Federal, has been called upon to en-

force a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities".

The carrier in the pending case has undoubtedly made an earnest effort to meet the criticisms directed at its earlier regulation in the former opinion of this court, and consequently instances of discrimination on account of race are less likely to occur under the regulation now prevailing. Nevertheless that regulation must also be condemned because it occasionally permits discrimination against members of both races in the allotment of dining-room privileges; and the court should therefore hold that the practice of the carrier in segregating the races in its dining-cars must be suspended whenever its enforcement results in the denial to any individual of his constitutional right of equality of treatment.